PUBLIC PROSECUTOR v. LOH ANG SING

[R.Cr.J. (Lee Hun Hoe J.C.) December 19, 1964]

[Sibu — Criminal Trial No. 30 of 1964]

Criminal Procedure — Joint trial — Acts forming part of same transaction — Criminal Procedure Code (Sarawak, Cap. 58), s. 157.

The two accused were charged with offences under the same section of the Internal Security Act, 1960. The prosecution applied for them to be jointly tried. The learned magistrate ruled that they should be tried separately but reserved the question for the consideration of the High Court.

Held: as the offences were committed at different times and different places and the exhibits were different, the learned magistrate was right in ruling that they should be tried separately.

Semble: The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However it is not necessary that all of them should be present to make the several incidents parts of the same transaction. The main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction.....Where the case for the prosecution is that all the accused persons carried out a single scheme by successive acts at different intervals and there was unity of purpose and the whole series of acts were linked together by one motive and design so as to constitute one transaction then a joint trial is not only valid but is also proper in the interest of public expense, time and convenience.

Cases referred to:—

(1) *Manikam* v. *Public Prosecutor* [1947] M.L.J. 90.

(2) *Yee Chee* v. *Regina* [1953] S.C.R. 64.

CRIMINAL REFERENCE.

Inspector Idris for the Public Prosecutor.

C. T. Wong for the accused.

Lee Hun Hoe J.C.: This is a reference in the form of a special case by the district court, Sibu under section 278 of Criminal Procedure Code reserving for consideration of this court a question of law arising in the proceedings in the lower court. On 28th November, 1964 two accused Loh Ang Sing and Tang Sing Kong were separately charged and both claimed trial. Both were charged with offences under the same section of the Internal Security Act, 1960 which has been extended to Sarawak. The prosecution applied for the two accused to be jointly tried. The learned magistrate ruled that they should be tried separately but stated that he would reserve the question for the consideration of this court. The question for the opinion of this court is whether the said determination was correct in point of law.

The matter was thus set down for argument. At the hearing the prosecution conceded that the two accused should be tried separately as the offences were committed at different times and different places. Also the exhibits are different. However, as the learned magistrate has stated that his decision may affect other accused persons charged with the commission of offences under the same section of the said Act I think I should give my opinion.

The fact that the accused were charged with the same offence does not necessarily mean that they may be tried together. Here it would appear that the offences were alleged to have been committed at different times and different places and also the exhibits are different. Therefore if the alleged offences committed by the accused are clearly distinct and different and are not offences committed in the same transaction then joint trial is not justified and may prove fatal. The only relevant provision which authorises joint trial of offenders under certain specified circumstances is section 157 of the Criminal Procedure Code which reads:—

> "When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all such charges."

The section permits joint trial where the offenders are accused of the same offence committed in the same transaction. That means an offence in which the offenders jointly tried are concerned and does not mean an offence under the same section of the law.

A number of acts may be so connected as to form part of the same transaction within the meaning of the said section 157 if there should exist between the accused community of purpose or design and continuity of action. Whether particular acts are so connected as to form part of the same transaction is a question which has to be decided according to the facts in each particular case. (See *Mallal's* Criminal Procedure, 4th Edn. p. 246).

In *Manikam* v. *Public Prosecutor* (1) two accused were tried jointly on charges of criminal trespass, but the charges alleged that the first accused committed the offence on one day and the second accused on a different day. It was held that as the offences were not committed in the same transaction, there should have been a separate trial of each accused.

Again in *Yee Chee* v. *Regina* (2) appellant, a prisoner, was charged jointly with two other prisoners for possession of chandu. A tin containing chandu was found by a prisoner's bed in a communal cell where twelve prisoners slept. Although the appeal was allowed on other ground it is interesting to note what Smith J. said on the question of joint trial:—

"There is another important point of procedure in

this case which magistrates and police prosecutors should bear in mind. Here three men were tried together for an offence under section 4(2) of Ordinance No. 27 of 1949. The only authority for a joint trial of offenders, or of trying offenders together, is section 171 of the Criminal Procedure Code. That permits a joint trial where the offence charged is the same offence, that means an offence in which all the persons jointly tried are concerned. It does not merely mean an offence under the same section of the law. Here the alleged possession of chandu by these prisoners was a distinct and different offence, nor were the offences committed 'in the same transaction' which also justifies a joint trial. Therefore, the cases against these three men should have been heard as separate cases. This deviation from the correct procedure might easily prove fatal on appeal."

Section 171 of the Criminal Procedure Code has now been renumbered as section 157.

The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However, I do not think it is necessary that all of them should be present to make the several incidents parts of the same transaction. In my view the main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction. If the various acts are done with a particular end in view they may be treated as parts of the same transaction. As to what is the same transaction must depend upon the facts and circumstances in each particular case. In my view for a joint trial under section 157 identity of purpose or design is sufficient. Identity of purpose in the sense of a conspiracy is not in any way necessary. If the prosecution alleges association and community of purpose among the accused then I think joint trial is permissible. It is of course for the prosecution who knows or should know all the facts to justify a joint trial. Where the accusation is that all accused persons carried out a single scheme by successive acts at different intervals and there was unity of purpose and the whole series of acts were linked together by one motive and design so as to constitute one transaction then a joint trial is not only valid but is also proper in the interest of public expense, time and convenience.

In my opinion in so far as this reference is concerned the learned magistrate had exercised his discretion properly and was right in refusing to hear the two accused together as the prosecution had not produced any good reasons to satisfy him why there should be a joint trial. If the prosecution wishes to apply for joint trial it is for the prosecution to justify it. The prosecution has all the facts and should have little difficulty in making out a good case for a joint trial. Even though an offence or offences are committed in the same transaction it is still a matter for the presiding magistrate to decide whether accused should be tried together or separately. How he is going to exercise his discretion must necessarily depend on the facts of each case. The discretion must of course be exercised judiciously.

Order accordingly.